

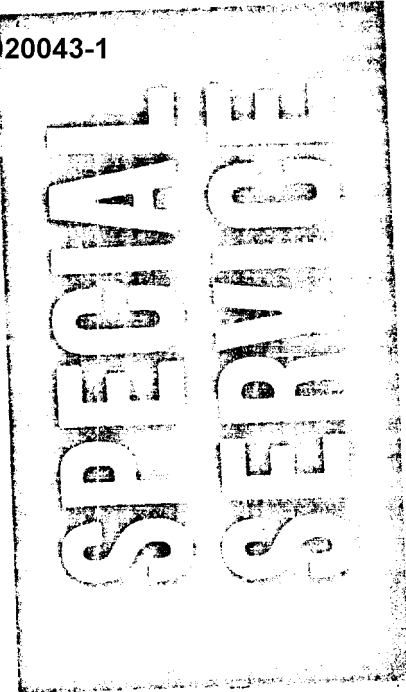


EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 1, 1977

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer
SEE ATTACHED LIST



DIC #71-3735

SUBJECT: Justice draft bill "To amend title 28 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, and for other purposes."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President; in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than cob Friday, September 16, 1977.

Questions should be referred to Robert E. Carlstrom (395-3856) ~~or to~~ _____, the legislative analyst in this office.

James B. MacRae
James B. MacRae for
Assistant Director for
Legislative Reference

Enclosures

Attachment

Department of Agriculture
Department of Commerce
Department of Defense
Department of Health, Education and Welfare
Department of Housing and Urban Development
Department of the Interior
Department of Labor
Department of State
Department of Transportation
Department of the Treasury
Central Intelligence Agency
Commission on Civil Rights
General Services Administration
Veterans Administration
Civil Service Commission
United States Postal Service
Federal Energy Administration

cc:

A. Gutierrez
M. McKenna
W. Nichols
J. Mullinix
H. Schreiber

Proposed Amendments to the Federal Tort Claims Act

Attached is a proposed Bill to amend the Federal Tort Claims Act, 28 United States Code, Sections 1346(b), 2671 - 2680, together with a Section-by-Section Analysis and a Cost Analysis.

The purposes of the proposed Bill are threefold: first, to provide the victims of common law and "constitutional torts" committed by federal employees with a remedy against a financially responsible defendant; second, to protect federal employees from suits for money damages arising out of the performance of their duties; and, third, to eliminate the need for the Department of Justice to hire private attorneys to represent individual federal employees against whom such suits might be brought. The proposed Bill would achieve these purposes by expanding the bases upon which the United States can be held liable for the conduct of its employees under the Tort Claims Act and by making suits against the government the exclusive civil remedy in such cases.

The concept of immunizing federal employees from suits based upon the performance of their duties is not new. Several existing statutes provide, on a piecemeal basis, immunity to specific categories of federal employees such as those who operate motor vehicles and medical and paramedical employees of some, but not all, government departments and agencies. This bill would expand that immunity so as to protect all federal employees in situations in which a remedy was available against the government.

Under the Bill proposed here, in suits alleging traditional common law torts, the government would be liable -- and the federal employee immune -- if the employee was acting within the scope of his office or employment. The determination of whether the employee was acting within the scope of his office or employment would be made on the basis of state law, just as it has been during the thirty years that the Tort Claims Act has been in existence. In suits alleging constitutional violations, however,

the basis of government liability -- and, consequently, of employee immunity -- would be broader; liability would arise if the employee acted "under color of" his office or employment, even though not "within the scope of" his office or employment. It might be possible to describe, with greater specificity than by use of the phrase "under color of," the circumstances under which the government will be subject to, and the employee immune from, suits alleging constitutional violations. It does not seem wise to attempt to do so, however, since any such attempt would probably result in the omission of situations not now foreseeable. Procedurally, the Federal Tort Claims Act provides that the Attorney General is to certify in each case that the individual employee was acting within the scope of his employment or under the color of his office in order for the employee to have immunity. The flexibility that this procedure provides seems preferable to a statutory designation of the parameters of the activities that might be engaged in under the color of an employee's office. Moreover, an individual plaintiff would be hard pressed to dispute such a certification, since its effect would be to provide the plaintiff with a solvent defendant without in any way diminishing his chances of recovery. Even if a judge were to raise the color of office question sua sponte, the certification by the Department of Justice should be very persuasive on the issue.

It should be noted that this Bill would not provide the government employee with absolute immunity from the consequences of his tortious conduct. Rather he would be subject to appropriate disciplinary action where his conduct resulted in the payment of damages by the government. Under such circumstances, the Attorney General would be required by the Bill to refer the matter for appropriate investigation and disciplinary action to the head of the department or agency involved. The department or agency, in turn, would be required to report annually to Congress on the action it takes in each such case. From a deterrent point of view, the prospect of disciplinary action and, if the conduct is criminal, the possibility of criminal prosecution, should be sufficient to prevent irresponsible individual action, and the reporting requirement should ensure effective supervision by the departments and agencies of their employees' conduct.

It might be argued that the combination of disciplinary action and agency accountability provided in the Bill will not be a sufficient deterrent -- that in an egregious case the individual employee should be personally liable in a third party action by the United States. Although the argument is plausible on its face, there are persuasive reasons for rejecting it. First, experience shows that egregious cases are extremely rare. Second,

one of the main purposes of the amendment is to improve employee morale and foster good faith, vigorous performance of duty, unimpaired by the threat of personal involvement in a lawsuit. To provide for third party actions so as to cover the rare instances in which they might be appropriate would be counter-productive in terms of achieving this purpose. Moreover, if a third party action against the employee were permitted, the employee would seek to intervene as a matter of right and would request the government to provide him with private counsel, and his presence in the suit would jeopardize the government's control of the litigation. While the statute could, of course, prohibit intervention, such a provision would hardly be conducive to improved employee morale. Finally, the overwhelming majority of federal employees would be unable personally to satisfy a judgment of more than a very modest amount. Thus, to permit a lawsuit over against them would be essentially a punitive gesture. For all of these reasons and in view of the deterrent effect of possible disciplinary action and even criminal prosecution, it seems undesirable and unnecessary to subject individual government employees to the added threat of civil liability.

As noted above, in addition to protecting government employees against individual lawsuits, the Bill would expand the bases upon which the United States could be sued in lieu of its employees. It would do so by creating a statutory cause of action against the United States for the constitutional torts of any of its agents. Such a cause of action presently exists only for certain constitutional torts (assault, battery, false imprisonment, false arrest, abuse of process and malicious prosecution) committed by investigative or law enforcement officers. It should be noted, however, that this expansion of government liability will not result in the protection of all federal employees from individual lawsuits based on acts committed during the course of their employment or under color of their office. This is because the exclusivity provision of the Bill is applicable only if there exists a remedy against the United States and because, even if the proposed amendments are enacted, suits against the United States will not be possible under the circumstances enumerated under Section 2680 of the Federal Tort Claims Act. Among the types of suits against the United States that would continue to be prohibited under that section are actions based on tortious conduct in the collection or assessment of taxes or customs duties (28 U.S.C. 2680(c)) and actions for libel, slander, misrepresentation, deceit or interference with contract rights (28 U.S.C. 2680 (h)). Thus, assuming that no constitutional violation was involved, government employees would continue to be individually liable in such cases.

In addition to expanding the bases for suits against the government, the Bill would also enhance the remedy available to victims of constitutional torts committed by government employees; they would be entitled to at least to liquidated damages of \$1,000 (where actual damages in a greater amount cannot be proved) and could recover a reasonable attorney's fee and other litigation costs reasonably incurred.

The provisions for recovery of liquidated damages, attorney's fees and litigation costs are based on the existing civil remedy against individual agents provided in the wiretap statute, 18 U.S.C. 2520. That statute would be "repealed" or modified with respect to suits based on acts performed by federal employees within the scope of their office or employment or under color of such office or employment. The victim's remedy in such cases would be against the United States. This approach is necessary in order to eliminate the necessity of employing private counsel in such cases and to avoid creating an unwarranted distinction between violations of the wiretap statute and other constitutional torts. Not all of the wiretap statute's remedies are carried over to the new cause of action against the United States, however. The alternative provision in 18 U.S.C. 2520 for compensation in the form of liquidated damages to be computed at a rate of \$100 per day for each day the violation continues has not been incorporated since it seems applicable only to prolonged wiretapping and since the minimum recovery of \$1,000 already provided seems adequate. In addition, the provision for punitive damages now found in the wiretap statute has not been included in the proposed amendment. The Federal Tort Claims Act has always precluded the award of punitive damages against the United States. Since the victim's remedy will no longer be against the individual who wronged him, but rather against the government, the imposition of punitive damages would penalize only the taxpayer without serving any meaningful deterrent purpose. Moreover, as pointed out above, the potential threat of disciplinary action or criminal prosecution should be sufficient to prevent the kind of excesses that would justify an award of punitive damages against an individual.

Under this Bill, state law would be applicable to any liability question in an action based upon traditional common law negligence. In suits based upon constitutional tort theories, federal law would be determinative. Federal law obviously should govern the interpretation of the Federal Constitution.

As has always been the case, state law would govern the measure of damages in traditional common law tort cases. State law would also govern the measure of damages in constitutional tort cases. While it could be provided that federal law should govern the damages issue in cases involving constitutional violations, there is very little federal law of damages in this area and it seems undesirable to burden the federal courts with the task of fashioning such law when state damage law would be appropriate in almost all cases. The only exception to the application of the state law of damages would be provided for liquidated damages for constitutional torts discussed above.

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With respect to defenses to liability, the Bill provides, as does the existing wiretap statute, that in constitutional tort cases "a good faith reliance on a court order or legislative authorization shall constitute a complete defense." In order to alleviate concern that this language might preclude the United States from asserting a good faith, reasonable belief defense on any basis other than a court order or legislative authorization, the Bill explicitly provides that this provision is to be "without any effect or limitation upon any other defenses." Because the good faith, reasonable belief defense is a developing area of law, it is believed advisable to allow opportunity for further development rather than to attempt more specific statutory language.

The question of whether all defenses available to an agent of the government in a suit against him personally should also be available to the government itself is not without controversy. With respect to constitutional violations at least, it is the view of some

that recovery should be permitted against the United States irrespective of defenses available to its agents. Essentially, this view is predicated on the belief that, as between the innocent citizen damaged by the constitutional wrong of a mistaken government agent and the government who set the agent in motion, it is more equitable to require the government to pay for the loss. Moreover, the fact that the government routinely accepts liability for the negligent conduct of its agents, makes it difficult to explain why it does not also accept liability for the intentional, albeit mistaken, constitutional torts of those agents. Nevertheless, inasmuch as it would be a dramatic departure from existing federal law to permit recovery in such cases, the Bill does not propose such a far-reaching remedy.

Mechanically the statute provides that, upon the certification of scope of employment or color of office, a lawsuit filed in state court will be removed to federal district court. Then, regardless of whether the suit was initiated in state or federal court, the United States will be substituted as the party defendant in place of the individual federal employee. The suit will then proceed just as if it had been initiated against the United States under the Federal Tort Claims Act.

The Federal Tort Claims Act requires that one must present a claim administratively to the agency or department that was responsible for the conduct in question and allow that department or agency an opportunity to investigate and reach a decision on the claim prior to filing suit. This requirement will continue to apply to all such Federal Tort Claims Act suits.

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Finally, the Bill is expressly made applicable to all pending claims and suits and to those that accrue after its effective date, which is specified as the date of enactment. There is some question whether the proposed amendments may be applied retroactively on the theory that they relate only to procedures and remedies or whether they must be applied prospectively only because they would deprive claimants or litigants of vested substantive rights. Having studied this question, it is concluded that the Bill is within the constitutional power of Congress to enact and that any challenge to its retroactive application can be met successfully.

A BILL

To amend title 28 of the United States Code, to provide for an exclusive remedy against the United States in suits based upon acts or omissions of United States employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1346(b) of title 28, United States Code is amended by striking the period at the end of the section and adding the following: ", or where the claims sounding in tort for money damages arise under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such liability to be determined in accordance with applicable Federal law".

SEC. 2. Section 2672 of title 28, United States Code, is amended by inserting in the first paragraph the following language after the word "occurred" and before the colon: ", or where the claims sounding in tort for money damages arise under the Constitution of the United States when such employee of the Government is acting within the scope of his office or employment, or under the color thereof, such

liability to be determined in accordance with applicable Federal law".

SEC. 3. Section 2674 of title 28, United States Code, is amended by (1) inserting in the first paragraph the following language after the word "claims" and before the comma: "based upon negligent or wrongful acts or omissions"; and (b) by adding as a third paragraph the following:

"The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the same extent as entitlement to compensation is recognized under the tort law of the place where the violation occurred, but shall not be liable for interest prior to judgment or for punitive damages: Provided, however, ^{that for a claim} (that for claims) arising under the Constitution of the United States, such compensation shall not be less than liquidated damages of \$1,000, plus a reasonable attorney's fee and other litigation costs reasonably incurred; and Provided further, that without any effect or limitation upon any other defenses, a good faith reliance on a court order or legislative authorization shall

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constitute a complete defense to any claim or suit arising under the Constitution of the United States."

SEC. 4. Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment or for claims arising from the violation of the Constitution of the United States by any employee of the Government while acting within the scope of his office or employment or while acting under the color thereof is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose violation or act or omission gave rise to the claim, or against the estate of such employee."

SEC. 5. Section 2679(d) of title 28, United States Code, is amended by deleting the provision in its entirety and substituting the following:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment or in claims arising under the Constitution of the United States that the employee was acting within the scope of his office or employment or under the color thereof at the time of the incident out of which the suit arose any such civil action or proceeding commenced in a Federal District Court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under the Federal Tort Claims Act."

"(d)(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment or in claims arising under the Constitution of the United States that the employee was acting within the scope of his

office or employment or under the color thereof at the time of the incident out of which the suit arose any such civil action or proceeding commenced in a state court shall be removed, without bond, at any time before trial, by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After such substitution the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under the Federal Tort Claims Act. The certification of the Attorney General shall conclusively establish scope of office or employment and in claims arising under the Constitution of the United States, acting under color of office or employment for purposes of such initial removal. Should a district court of the United States determine on a hearing on a motion to remand held before trial on the merits that

the employee defendant was not acting within the scope of his office or employment, and in claims arising under the Constitution of the United States, acting under color of office or employment, the case shall be remanded to the state court in which it was initially filed."

"(d)(3) The provisions of the Federal Tort Claims Act shall not apply in cases where the United States has not waived its sovereign immunity under this Chapter.

"(d)(4) Where an action or proceeding under this title is precluded because of the availability of a remedy through proceedings for compensation or other benefits from the United States as provided by any other law, the action or proceeding shall be dismissed, but in that event the running of any limitation of time for commencing, or filing an application or claim in such proceeding for compensation or other benefits shall be deemed to have been suspended during the pendency of the civil action or proceeding under this title.

SEC. 6. Section 2679 of title 28, United States Code, is amended by adding a new subsection (f) as follows:

"Where an action or proceeding under Section 1346(b) or 2672 results in a judgment against the United States or an award, compromise or settlement paid by the United States, the Attorney General shall forward the matter for such further administrative investigation or disciplinary action as may be appropriate to

the head of the department or agency by whom the employee whose violation or act or omission gave rise to the claim was employed. With respect to each such referral the head of the department or agency shall report annually to Congress the nature and result of any action taken pursuant to such referral.

SEC. 7. Section 2680(h) of title 28, United States Code, is amended to read as follows:

"Any claims arising out of libel, slander, misrepresentation, deceit, or interference with contract rights."

SEC. 8. Subsections (a) through (d) of section 4116 of title 38, United States Code, are repealed, as of the effective date of this Act, and subsection (e) of that section is amended by deletion of the designation "(e)", by deletion of the words "person to whom the immunity provisions of this section apply (as described in subsection (a) of this section)," and by inserting in the place of those words deleted the words "employee of the Department of Medicine and Surgery". Subsections (a) through (e) of section 233, title 42, United States Code, are repealed, as of the effective date of this Act, and subsection (f)

is amended by deletion of the designation "(f)" and the insertion of the designation "(a)", and subsection (g) is amended by deletion of the designation "(g)" and the insertion of the designation "(b)". Subsections (a) through (e) of section 1089, title 10, United States Code, are repealed, as of the effective date of this Act, subsection (f) of that section is amended by deletion of the designation "(f)", insertion of the designation "(a)", by the deletion of the words "person described in subsection (a)" and by the insertion in place of those words deleted the words "employee of the armed forces, the Department of Defense, or the Central Intelligence Agency," and subsection (g) of that section is amended by deletion of the designation "(g)" and insertion of the designation "(b)". Subsections (a) through (e) of section 2458a, title 42, United States Code, are repealed, as of the effective date of this Act, and subsection (f) is amended by the deletion of the designation "(f)", by the deletion of the words "person described in subsection (a)" and by the insertion in place of those words deleted the words "employee of the National Aeronautics and Space Administration".

SEC. 9. Section 2520, title 18, United States Code, shall not apply to civil causes of action against officers

or employees of the United States while acting within the scope of their office or employment, or while acting under the color of such office or employment.

SEC. 10. This Act shall become effective on the date of its enactment and shall apply to all claims and suits pending on that date or accruing thereafter.

Section by Section Analysis of A Bill To
Amend Title 28 of the United States Code,
to Provide for An Exclusive Remedy Against
the United States in Suits Based Upon Acts
or Omissions of United States Employees,
and for Other Purposes

The purpose of the Bill is to broaden the coverage of the Federal Tort Claims Act to make a claim or suit pursuant to that statute against the United States an exclusive remedy which would have the effect of prohibiting most suits against a federal employee based upon his negligent or wrongful acts or omissions while acting within the scope of his office or employment. The Bill would also make a Federal Tort Claims Act suit against the United States an exclusive remedy which would prohibit a suit against a federal employee based upon a violation of the Constitution of the United States if the federal employee was acting within the scope of his office or employment, or acting under the color of such office or employment. Except in limited circumstances, a civil damage suit against a federal employee based upon his acts while performing his federal duties would no longer be possible. This is desirable both from the point of view of employee moral and because it

would eliminate the conflict of interest problems that require the Department of Justice to obtain expensive private attorneys to represent individual federal employee defendants.

Section 1 amends Subsection 1346(b) of Title 28 to make it clear that the Federal Tort Claims Act would include a Bivens theory (Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U.S. 288 (1971)) as well as a negligence theory. The language also provides that in a Bivens cause of action liability will be determined in accordance with federal law. In negligence actions under the Tort Claims Act liability is determined based upon the applicable state law. However, it is necessary to utilize federal law when the claim is based upon an alleged violation of the Federal Constitution.

Section 2 amends Section 2672 of Title 28 in the same manner that Section 1 amends Section 1346(b). This Section simply conforms the administrative claim jurisdiction to include claims for Constitutional violations, just as Section 1 broadened the jurisdiction for a Federal Tort Claims Act lawsuit.

Section 3 amends Section 2674 of Title 28, which is the Section of the Federal Tort Claims Act that provides

the method of determining liability. The first paragraph of Section 2674 is amended to make it clear that the provisions of that first paragraph apply only to Federal Tort Claims Act suits based upon negligence theories as distinguished from Constitutional deprivation allegations. The second paragraph of Section 2674 remains unchanged. A new third paragraph of Section 2674 is provided to establish that in any Federal Tort Claims Act suit based upon alleged Constitutional deprivations the amount of compensation to be awarded is the same amount as would be awarded under the tort law of the state where the incident occurred. The new third paragraph also contains two provisos. The first such provision establishes that in actions based upon claims arising under the Constitution of the United States compensation shall not be less than liquidated damages of \$1,000, plus a reasonable attorney's fee and other litigation costs reasonably incurred. Those provisions are drawn from 18 U.S.C. § 2520, which Section establishes a civil cause of action for the interception of wire or oral communications. Those provisions are expressly incorporated into the Federal Tort Claims Act because a later part of the Bill (Section 9) provides that 18 U.S.C. § 2520 shall not apply to civil damage remedies against federal

employees who are acting within the scope of their office or employment, or acting under color of such office or employment. This provision, however, has been broadened to cover all Constitutional violations in addition to the interception or disclosure of wire or oral communications. Thus, it is clear beyond question that although a claimant would no longer have a remedy against the federal employee personally, such a claimant would lose nothing by the passage of this Bill because the same or broader remedy, except for punitive damages, would be available against the United States pursuant to the Federal Tort Claims Act.

The second proviso to the third paragraph of Section 2674 is also based upon 18 U.S.C. § 2520. This proviso establishes that a good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil claim or suit arising under the Constitution of the United States. That common law defense was expressly recognized in Bivens (456 F.2d 1339) to be applicable in suits based upon alleged violations of the Constitution. Because this Bill would eliminate the possibility of a suit against an individual federal employee, and because the liability of the United States is vicarious,

this second proviso establishes that the same defense shall be available in a suit against the United States brought under the Federal Tort Claims Act. The prefatory language which states that the good faith defense is without effect or limitation on any other defense is included so as to leave open the question of whether a good faith or other defense may be based upon other than a court order or legislative authority. The "good faith reasonable belief" defense is a developing area of law and it is thought best not to treat that specifically in the statute. Rather, the language of the Bill carries over the court order or legislative authority provision from the existing Title 18 section. This language should not be construed to foreclose other common law defenses in appropriate circumstances.

Section 4 is a Section of this Bill that specifically provides immunity to individual federal employees. In its existing form, Section 2679(b) immunizes only federal employees who are operating automobiles. As amended, the Section would immunize most other federal employees from civil damage lawsuits. Thus, the Section is the logical culmination of the series of statutes which on a piecemeal basis afforded immunity to specific categories of federal employees.

With regard to traditional negligence suits, the federal employee is immune from suit if the acts or omissions which gave rise to the lawsuit were performed within the scope of the office or employment of that federal employee. The language of Subsection (d)(3) establishes that an employee of the government is not immunized from suit if the United States has not waived its sovereign immunity for that type of suit. The immunity is so limited to insure that a claimant will not be precluded from suing both the United States and its employee. For example, if the claim were based upon libel or slander, or any other tort for which the United States retains its sovereign immunity, the claimant would yet be able to proceed against the employee.

The Bill further expands the immunity of federal employees by providing the applicability of the immunity to suits which are based upon alleged Constitutional deprivations or violations. The applicable immunity is broader in such cases than in traditional negligence cases by virtue of the language which makes it applicable if the individual was acting within the scope of his office or authority, or acting under the color of such office or authority. The color of office expansion of the traditional scope of employment language, carried throughout the Bill in all relevant sections is to demonstrate the distinction

between the two categories: (1) for common law negligence, and (2) for suits alleging Constitutional deprivation.

The broadened applicability of the immunity is thought necessary because it is in the "Constitutional tort" cases in which the most difficult scope of employment questions arise. Because the basic purposes of the Bill are to provide a meaningful remedy to victims of Constitutional wrongs and to protect individual federal employees from money damage lawsuits and to eliminate the necessity of having the Department of Justice hire private counsel to represent individual federal employees, it is felt important to effectuate these goals by providing the certainty of broad coverage of the immunity in the Constitutional tort area. It is preferable to use the "color of office" language rather than to define or try to use specific language because such specific definitions would limit flexibility in specific cases and would perhaps be counterproductive in excluding coverage in future cases that are unanticipated currently.

Section 5 amends Section 2679(d) of Title 28 to make the language more specific. The original Subsection (d) was somewhat confusing and produced some problems even in routine automobile accident cases. The cause of that confusion was that the pre-existing statutory language attempted

to cover both suits brought in federal court and suits originally brought in state court. However, without treating them separately it is extremely difficult to cover all contingencies with specificity. The Subsection is further subdivided into three paragraphs. Subsection (d)(1) would apply to suits originally brought in a federal district court. Subsection (d)(2) applies to suits which are originally brought in a state court. A suit brought in state court is removed to federal court and thereafter it is treated just as if it had been brought originally in federal court against the United States under the Federal Tort Claims Act. Both of these subsections provide that the suit shall proceed against the United States just as if it had originally been brought against the United States, and the United States will have available all defenses to which it would have been entitled had the action originally been brought against the United States.

Subsection (d)(4) establishes that if a Federal Tort Claims Act lawsuit is dismissed because a form of federal compensation is the exclusive remedy of the plaintiff, that plaintiff can utilize the date of the filing of his claim or lawsuit to be the date upon which his claim for compensation benefits was filed. The effect of this provision

is to protect such a plaintiff against the possibility that he would not be able to file a lawsuit because of compensation system coverage but that he would not be eligible to receive compensation because he waited too long to make a claim for such compensation benefits. This language is quite similar to language utilized in some of the statutes which have served to make specific categories of government employees (medical and paramedical employees of the Veterans Administration, the Public Health Service, and the Department of Defense) immune from suit.

Section 6 of the Bill adds a new Subsection (f) to Section 2679 of Title 28, United States Code, to provide statutory impetus to the need for instituting investigation of and disciplinary action against egregious conduct of employees whose behavior gave rise to the suit or claim. If a judgment is awarded against the United States or the matter is compromised by the Attorney General, the Attorney General shall refer the matter to the head of the employing agency for appropriate investigation or disciplinary proceedings. The Bill also provides that the head of the employing agency shall report annually to the Congress regarding the agency's disposition of each case referred. Of course, there is ample authority under present personnel

laws and regulations to enable the employing agency to institute disciplinary proceedings against employees who engage in improper conduct and the agency may still do so even if no referral is made by the Attorney General. It is thought, however, that a statutory provision such as that contained in Section 6, is desirable to encourage such proceedings in appropriate cases and to require them if the Attorney General refers the matter to the agency.

Section 7 amends Section 2680(h) of Title 28 which deals with suits under the Federal Tort Claims Act based upon assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Originally, suits based upon those theories were not allowable. Several years ago this Section was amended to provide that such suits could be brought if the acts were performed by law enforcement officers. Under the proposed amendment, such suits will be permissible if the torts are committed by any federal employee. The intent is to allow such suits as a quid pro quo for immunizing individual federal employees from liability. Not to do so would be to provide certain areas in which a plaintiff would have no remedy against the United States or the individual employee.

Section 8 is a technical "repealer" section. There are in existence a number of statutory provisions that

provide the same type of immunity to selected categories of government employees. If this Bill is passed the piecemeal statutes would no longer be required, and Section 8 repeals those provisions. This Bill would have the further advantage that the provisions of law would be encompassed within the Federal Tort Claims Act, rather than being scattered throughout the United States Code as is now the case.

Section 8 also changes the designation of certain other sections which will remain in existence. The provisions of the existing statutes which provide for departmental or agency discretion and authority to indemnify individual employees or to purchase insurance to protect them in situations where the Federal Tort Claims Act does not apply remain in effect. The only parts that are repealed are those that are redundant of the Federal Tort Claims Act if this Bill is passed.

Section 9 provides that Section 2520, Title 18, United States Code, shall not apply to civil causes of action against officers or employees of the United States while acting within the scope of their offices or employment, or under the color of such office or employment. It is necessary to provide expressly that the cause of action established by that Section does not apply to all federal

employees so as to provide for their immunity from all types of civil damage suits. Claimants or plaintiffs who would have otherwise had a claim against a federal employee under that Title 18 Section will not be harmed by making it inapplicable as against a federal employee because in Section 3 of the Bill such a cause of action is expressly provided to be available as against the United States under the Federal Tort Claims Act.

This Bill will serve to abolish most common law causes of action and the federally recognized "Constitutional tort" causes of action against federal employees. Because the cause of action created by 18 U.S.C. 2520 is so closely connected with the Constitutional type of tort, it is thought to be better to expressly recognize this cause of action to be under the Federal Tort Claims Act and abolish the Section 2520 cause of action against a federal employee.

Other federal statutory causes of action which provide for disciplinary or penal types of liability are not intended to be abolished by this Bill. An example would be 26 U.S.C. 7217 which provides for a cause of action for damages based upon unauthorized disclosure of tax information. Because such disciplinary, penal or deterrent statutes are not the traditional type of money damage causes of action it is not appropriate to abolish them and consider

the causes of action to be under the Federal Tort Claims Act. Further, to make such an attempt would normally be inconsistent with the intent of Congress in passing such measures. It should be noted, for example, that Congress has authorized the Secretary of the Treasury to repay to any officer or employee of the United States the full amount of such monies as may be recovered against him in any court for any internal revenue taxes collected by him, with the cost and expense of suit and all damages and costs recovered against any officer or employee by reason of anything done under the Internal Revenue Code (26 U.S.C. 7423). Thus, the Bill only abolishes traditional common law and Constitutional tort causes of action against federal employees based upon their performance of their duties.

Section 10 simply provides that the Act shall become effective on the date of its enactment, and that it shall apply to all pending claims and suits and those accruing thereafter.

COST ANALYSIS

A cost analysis of the proposed Bill requires examination of two points. The first item involves comparing the amount that the government would save by virtue of eliminating the current expense of hiring private attorneys to represent individual federal employee defendants in cases where Department of Justice attorneys cannot provide that representation because of a conflict of interest. We must, of course, balance that savings against the amount of additional cost to the Department of Justice to handle the additional cases required by making the Federal Tort Claims Act remedy an exclusive one against the United States. It is the considered judgment of the cognizant Department of Justice officials that analyzing these two factors, there will be a net savings to the United States.

In recent years the amount of money that the United States has paid for private counsel has increased dramatically. In Fiscal 1975 approximately \$48,000 was paid to private attorneys. In Fiscal 1976 private attorney fees of approximately \$550,000 were incurred. In Fiscal 1977 the Congress appropriated \$1.86 million dollars in a

supplemental appropriation for the purpose of paying private attorneys. Without any change in the law it is reasonable to expect that the number of cases brought against federal employees in which the Department of Justice could not provide representation will at least remain at the current level, and could quite possibly increase.

It is the opinion of the Department of Justice that if the Bill were enacted the Department could handle all such cases brought under the Federal Tort Claims Act, with only a minimal increase in attorney and support personnel. These cases can be defended by the Department of Justice at a fraction of the cost incurred by private attorneys for several reasons. The salary of Departmental employees averages approximately \$16.00 per hour as compared to an hourly fee paid to private law firms of \$60.00 to \$75.00 per hour. Secondly, because of attorney expertise and structured supervisory review, less time per case is spent by Departmental attorneys, without jeopardizing effectiveness, than has been devoted by the private law firms retained in preceding years.

The second factor to be analyzed is the amount that the Federal treasury would be required to pay because of settlements or adverse judgments in the cases that would be brought against the United States under the Bill which are now brought against individual federal employee defendants. While these amounts cannot be predicted with great accuracy, it is the considered judgment of knowledgeable officials of the Department of Justice that the additional amounts to be so paid will not be great. The success that the Department of Justice has had in defending such suits has been considerable. When cases are successfully defended the only expense is the cost of litigation. Secondly, the amount to be awarded in some of these cases is quite small. For example, the Bivens case involved years of litigation, including a major Supreme Court decision that has fostered many of these suits. However, that case was terminated by a payment of only \$83.33 by each of the six individual defendants for a total of \$500. In other cases it is predictable that an adverse judgment might award a plaintiff \$10,000 or \$20,000. While that amount could total much more in a situation where there are multiple plaintiffs, such as in

the District of Columbia "May Day" cases, based upon Departmental experience those cases should occur only rarely.

In the final analysis it is thought that enactment of the Bill would result in a net savings to the United States. While minimal attorney and staff increases might be necessary and some amounts will be paid out in the form of judgments or settlements, the total of those amounts is expected to be considerably less than the amounts in excess of \$1,000,000 per year that are currently being incurred to retain private law firms to represent the individual federal employees.